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Let the Punishment Fit the Crime: State v. Newton, Chapman v. United States, and the Problem of Purity and Prosecutions

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Let the Punishment Fit the Crime: *State v. Newton*, *Chapman v. United States*, and the Problem of Purity and Prosecutions

I. INTRODUCTION

Luis Mahecha-Onofre (Mahecha) was a passenger on Iberia Airlines flight 910, which stopped in Puerto Rico en route from Bogota, Columbia to Madrid, Spain. While examining passenger luggage, the Puerto Rican customs officials noticed two unusually hard and heavy suitcases with a strong chemical odor. The officials performed a field test on the suitcases which indicated that the suitcases themselves were made of cocaine. Once Mahecha admitted ownership of the suitcases, further testing was performed. This testing indicated that approximately 2.5 kilograms of cocaine was chemically bonded with acrylic material to create the outer shell of the suitcases. The acrylic shell of the suitcases bonded with the cocaine served as a transport or carrier medium for the cocaine. The suitcases weighed 12.8 kilograms. Should Mahecha's sentence for possession and distribution of cocaine be determined by the weight of the pure cocaine or by the total weight of the suitcases chemically bonded with the cocaine?[1]

The answer to this question is important because both the Louisiana Legislature and the United States Congress grade penalties for the possession and trafficking of a controlled dangerous substance according to the weight of the drug possessed or distributed. In connection with the factual scenario set forth above, this determination meant the difference between a ten-year mandatory sentence, if he was convicted of possession of more than five kilograms of cocaine, and no mandatory sentence, if convicted of possession of five kilograms or less.[2] Quite often, the very nature of the offense—not just the penalties assigned—can be determined by the weight of the controlled dangerous substance possessed. For example, the difference between simple possession of a controlled substance and possession with intent to distribute does not depend on actual attempts to distribute the drug, but rather upon the weight of the substance found. A heavy weight leads to the inference

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1. U.S. v. Mahecha-Onofre, 936 F.2d 623 (1st Cir. 1991).

2. 21 U.S.C.A. § 841(b)(1)(A) (West Supp. 1991) provides for a minimum 120-month prison term for possessing with intent to distribute five kilograms or more "of a mixture or substance containing a detectable amount" of cocaine.

that the possessor cannot possibly be possessing merely for his own personal use and thus must have the intent to distribute.

Federal law enunciates this graded penalty scheme in the Anti-Drug Abuse Act of 1986,[3] while Louisiana state law does so in Louisiana Revised Statutes 40:967 (1986). Such a penalty scheme was intended "to punish severely large volume traffickers at any level."[4] The problem with this statement of congressional intent is whether "large volume traffickers" refers not only to those who possess a large volume of controlled dangerous substances, but also to those who carry a relatively small amount of the controlled dangerous substance either in a heavy carrier medium, diluted in a cutting agent, or in a transport medium.

There are several different reasons why the weight of the controlled dangerous substance may be substantially less than the substance found in a drug dealer's possession. In some instances, as with LSD, a pure dose of the drug is so small or lethal that dealers must sell it to retail customers in a carrier medium such as blotter paper, sugar cubes, or gelatin. In other instances, as in cocaine, dealers "cut" the pure drug with mediums such as talcum powder or baking soda in order to dilute the controlled dangerous substance. Still in other instances, as in the cocaine suitcase scenario described above, drug dealers hide the controlled dangerous substance in a carrier medium for transporting or smuggling. For clarification purposes this type will be referred to as transport carrier mediums. The issue in all three instances noted above is whether the weight of the carrier medium should be included with the weight of the pure drug for sentencing purposes.

Both the Louisiana Supreme Court and the United States Supreme Court have addressed this issue. However, each court, interpreting different statutes, has reached a different conclusion. In *State v. Newton*,[5] the Louisiana Supreme Court, interpreting Louisiana Revised Statutes 40:967, held that "[t]he defendant's punishment . . . depends upon grams of cocaine or related substances by weight and not upon the weight of the preparation or mixture containing the cocaine or related substance."[6] On the other hand, the United States Supreme Court in *Chapman v. United States*,[7] interpreting the Anti-Drug Abuse Act, held that "the

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3. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C.A. § 841 (West Supp. 1991)).

4. H.R. Rep. No. 99-845, pt. 1, at 12, 17.

5. 545 So. 2d 530 (La. 1989). State v. Newton may have been offset by 1989 La. Acts No. 369 which amended La. R.S. 40:967 to include the "detectable amount" language present in 21 U.S.C.A. § 841 (West Supp. 1991). See State v. Temple, 572 So. 2d 662 (La. App. 5th Cir. 1990), which suggests this. (This issue will be discussed infra at notes 25-34.).

6. *Newton*, 545 So. 2d at 530.

7. 111 S. Ct. 1919 (1991), aff'g U.S. v. Marshall, 908 F.2d 1312 (7th Cir. 1990).

statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD [lysergic acid diethylamide]."[8]

In *United States v. Mahecha-Onofre*,[9] the cocaine suitcase scenario described above, the United States First Circuit Court of Appeals attempted to follow the holding of *Chapman*. The court held that the acrylic and the cocaine which formed the suitcase were "a mixture or substance containing a detectable amount"[10] of cocaine within the meaning of the federal statute.[11] Thus the court imposed a ten-year mandatory sentence on Mahecha based on the total weight of the suitcase, rather than on the 2.5 kilograms of pure cocaine in his possession.

The purpose of this note is to examine the state of the law in Louisiana on this issue in light of Act No. 369 of 1989,[12] an amendment to Louisiana Revised Statutes 40:967, which added the "detectable amount" language present in the federal statute[13] to the Louisiana statute. In order to fulfill its purpose, this note will first consider the state of the law in Louisiana by tracing the legislative history of Louisiana Revised Statutes 40:967 and the jurisprudence before *State v. Newton*.[14] It will explain the court's decision in *Newton* and attempt to assess the effect of the Louisiana Legislature's amendment to Louisiana Revised Statutes 40:967 on *Newton*. Because there is no Louisiana jurisprudence interpreting the newly amended statute at this time, this note will then trace the legislative and jurisprudential history of *Chapman v. United States*,[15] and explain the majority's decision in *Chapman* in order to identify how other courts have interpreted this language. Finally, this note will assess the present differences in the Louisiana and federal statutory schemes and explain why Louisiana's scheme is preferable.

II. The State of the Law in Louisiana

A. The Legislative and Jurisprudential Background of the Decision of the Supreme Court in State v. Newton[16]

When the Louisiana Supreme Court decided *Newton*, Louisiana Revised Statutes 40:967 stated that "any person who knowingly or

8. Id. at 1929.
9. 936 F.2d 623 (1st Cir. 1991).
10. Id. at 625.
11. 21 U.S.C.A. § 841 (West Supp. 1991).
12. See supra note 5.
13. 21 U.S.C.A. § 841 (West Supp. 1991).
14. 545 So. 2d 530 (La. 1989).
15. 111 S. Ct. 1919 (1991).
16. 545 So. 2d 530 (La. 1989).

intentionally possesses twenty-eight grams or more but less than two hundred grams, *of cocaine or related substances* . . . shall be sentenced to serve a term of imprisonment at hard labor for not less than five years nor more than thirty."[17] There was no provision in the statute regarding purity or carrier mediums. This issue was not discussed until the Louisiana Fifth Circuit Court of Appeal addressed it in *State v. Laino*.[18]

In *Laino*, the court held that the "definition of cocaine is intended to include any preparation which contains cocaine or ecgonine (an acid which is the essential element of cocaine) whether pure or cut with other ingestible material."[19] Only 33.6% of the powder was pure cocaine, but the court used the total weight of the powder (452 grams) to determine Laino's sentence. The defendant was convicted of possession of more than 400 grams of cocaine and thus subject to a minimum mandatory sentence of fifteen years.[20] Three years later, in *State v. Newton*,[21] the fifth circuit had a second opportunity to address this issue, but this time the court of appeal did not have the final word.

B. State v. Newton

In *State v. Newton*, the fifth circuit affirmed Carl Newton's conviction of possession of more than 200 grams of cocaine, thus requiring the imposition of a ten-year minimum sentence.[22] A forensic expert at the trial testified that the total amount of packaged powder weighed about 375 grams while the active component, cocaine, weighed only 176.2 grams. Nevertheless, the court, citing *Laino*,[23] based Newton's sentence on the gross weight of the cocaine mixture rather than the weight of the pure cocaine.

The Louisiana Supreme Court granted writs on the issue. With little explanation, the court stated:

> In the absence of legislative intent to the contrary, we read [Louisiana Revised Statutes] 40:967(F) no more broadly than the definition of cocaine provided by [Louisiana Revised Statutes] 40:964, Schedule II(A)(4). The defendant's punishment therefore depends upon grams of cocaine or related substances by weight

17. La. R.S. 40:967 (1986) (emphasis added).
18. 499 So. 2d 1189 (La. App. 5th Cir. 1986).
19. Id. at 1192.
20. Id.
21. 538 So. 2d 752 (La. App. 5th Cir. 1989).
22. The ten-year minimum sentence is required by La. R.S. 40:967(F)(2)(b) (Supp. 1992).
23. 499 So. 2d 1189 (La. App. 5th Cir. 1986).

> and *not* upon the weight of the preparation or mixture containing the cocaine or related substance.[24]

The court vacated the judgment of the court of appeal, entered judgment for possession of 28 grams or more, but less than 200 grams of cocaine, and remanded for resentencing.

C. *Analysis of Louisiana Jurisprudence*

Thus, before the supreme court's decision in *Newton*, Louisiana jurisprudence incorrectly construed the words "cocaine or related substances" in Louisiana Revised Statutes 40:967 (1986) to mean any substance containing a detectable amount of cocaine and punished accordingly. The supreme court's decision in *Newton* corrected this inadequate interpretation. Although it reached the opposite conclusion of the United States Supreme Court in *Chapman*, it was interpreting a statute with an entirely different meaning. However, Louisiana's statute was amended shortly thereafter.

D. *Subsequent Legislative Acts*

The Louisiana Legislature amended Louisiana Revised Statutes 40:967(F) in June of 1989.[25] The statute now provides:

> Any person who knowingly or intentionally possesses twenty-eight grams or more, but less than two hundred grams, *of cocaine or of a mixture or substance containing a detectable amount of cocaine or of its analogues* shall be sentenced to serve a term at hard labor of not less than five years nor more than thirty. . . .[26]

Governor Roemer approved this amendment on June 29, 1989, ten days after the Louisiana Supreme Court decided *Newton*. Thus, the legislature could not have passed it in response to *Newton* because the bill was introduced in the senate on May 1, 1989, forty-six days before the supreme court rendered its decision, but after the court granted writs to decide the issue.[27] This amendment poses a new question: Is the "detectable amount" language added to Louisiana Revised Statutes

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24. State v. Newton, 545 So. 2d 530, 530 (La. 1989) (emphasis added).
25. 1989 La. Acts No. 369. The introductory statement of this act states its purpose: To amend and reenact R.S. 40:967 (B) and (F), relative to controlled dangerous substances; to include a mixture or substance containing a detectable amount of cocaine or of its analogues under the controlled dangerous substances law; to provide increased penalties for violations involving large quantities of amphetamine or methamphetamine; and to provide for related matters.
26. La. R.S. 40:967(F) (Supp. 1992) (emphasis added).
27. 545 So. 2d at 530.

40:967 the clear legislative intent to punish regardless of purity which the court in *Newton* noted was absent from the statute at that time?[28]

At the meeting of the House Committee on the Administration of Criminal Justice on May 31, 1989, Lieutenant Joseph Booth of the Louisiana State Police presented Senate Bill 447 (later adopted as Act No. 369 of 1989), which amended Louisiana Revised Statutes 40:967(F) to include the detectable amount language present in the federal statute. Lieutenant Booth urged that the bill "allows criminal laboratories to test for the presence of cocaine without forcing the lab to perform extensive quantitative tests and analysis."[29] Lieutenant Booth's interest in freeing criminal laboratories from the responsibility of extracting the pure drug from the substance or mixture containing a detectable amount of the pure drug suggests that the amendment was designed to produce the same effect as *Chapman*. Thus, in Louisiana, as well as under the federal statutory scheme, the weight of the entire substance rather than the weight of the pure drug apparently will determine the appropriate sentence.

E. Subsequent Jurisprudence

Neither the courts of appeal nor the Louisiana Supreme Court has had the opportunity to interpret the newly amended Louisiana Revised Statutes 40:967. In each case since *Newton*, the defendant's actions had occurred before the amended statute came into effect.[30] In *State v. Temple*,[31] because the defendant was arrested on February 6, 1988, and tried in July, 1989, the new statutory scheme was not yet in effect.[32] Therefore, the court was forced to interpret the pre-amendment statute and followed *Newton*. However, in dicta, the court stated, "[t]he Louisiana Legislature in an apparent attempt to offset *Newton* passed Act 369 in 1989 amending LSA-R.S. 40:967(F) whereby a defendant's punishment now depends on the weight of the substance containing a *detectable amount* of cocaine."[33]

But Act No. 369 of 1989 of the Louisiana Legislature was introduced in the senate on May 1, 1989, almost two months *before* the court

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28. 545 So. 2d at 530.

29. Tapes of Hearings on S.B. 447 before the House Committee on Administration of Criminal Justice (May 31, 1989) (statement of Lieutenant Joseph Booth of the Louisiana State Police).

30. State v. Rodriguez, 569 So. 2d 5 (La. App. 3d Cir. 1991); State v. Martinez-Sanchez, 563 So. 2d 509 (La. App. 4th Cir. 1990); State v. Temple, 572 So. 2d 662 (La. App. 5th Cir. 1990).

31. 572 So. 2d 662 (La. App. 5th Cir. 1990).

32. La. R.S. 40:967 (Supp. 1992) became effective September 3, 1989.

33. 572 So. 2d at 664 (emphasis in original).

decided *Newton*. Therefore, unless the Louisiana Legislature predicted the future, it is difficult to see how they were attempting to offset *Newton*. However, through their use of the "detectable amount" language in the amendment, the legislature effectively rendered the supreme court's holding in *Newton* inapplicable.

F. Summary

Since *Newton* is inapplicable and the subsequent jurisprudence has not yet interpreted the newly amended statute, the courts may look to the legislative intent and jurisprudence interpreting this language in other jurisdictions in order to assess how this language should be interpreted in Louisiana. Based on the purposes of the amendment as stated in committee,[34] it seems that those responsible for the bill designed it to disregard purity and focus instead on the presence of a controlled dangerous substance. Thus, once the presence of cocaine is found in a substance, the entire substance, regardless of its contents, will be weighed and the possessor punished accordingly. Whether the Louisiana courts will accept this interpretation of the legislative intent remains to be seen. Thus, the next section of this note will explain how and why other courts, most notably the United States Supreme Court in *Chapman v. United States*,[35] have interpreted this language to mean that the weight of the entire substance should be used in determining the appropriate sentence. While the Supreme Court's decision is not a precedent for Louisiana courts, its reasoning may be helpful in order to predict how Louisiana courts will interpret the "detectable amount" language.

III. *CHAPMAN V. UNITED STATES*

A. The Legislative and Jurisprudential Backgrounds

> The widespread use of illegal drugs is one of the most pressing problems facing our society. Illegal drugs are killing children and destroying families. Vast profits from the sale of illegal drugs have created a new criminal underworld which promotes violence and feeds on death.[36]

Reacting to this growing drug problem across the country, Congress amended 21 U.S.C. section 841 by passing the Anti-Drug Abuse Act of 1986 in order to increase the penalties for drug sellers and to set mandatory minimum sentences corresponding to the weight of a "mixture

34. See supra text accompanying note 29.
35. 111 S. Ct. 1919 (1991).
36. 132 Cong. Rec. S14,282 (daily ed. Sept. 30, 1986) (statement of Sen. Kennedy).

or substance containing a detectable amount of" various controlled substances.[37] Before this, penalties were based upon the weight of the pure drug involved.[38] But with the amendment, Congress adopted a "market-oriented" approach to punishing drug trafficking under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.[39] The statute now enunciates minimum and maximum penalties graded according to weight for heroin, cocaine, phencyclidine (PCP), lysergic acid diethylamide (LSD), marijuana, and methamphetamine.[40]

With the newly amended statute in place, courts began to interpret the "detectable amount" language. The courts were forced to decide whether the weight of the entire substance possessed, regardless of its contents, *or* the weight of the pure drug only would be used for sentencing purposes. Before the Supreme Court's decision in *Chapman*, all of the United States circuit courts of appeals[41] addressing this issue held that the weight of the entire substance should be used to determine the appropriate sentence.[42] All of the district courts addressing the issue, except one,[43] held similarly. Thus, an overwhelming number of courts have decided to include the weights of carrier mediums and cutting agents with the weight of the pure controlled dangerous substance in order to determine sentences.

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37. U.S. v. Hoyt, 879 F.2d 505, 513 (9th Cir. 1989).

38. The Controlled Dangerous Substances Penalties Amendments Act of 1984, a chapter of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98-2068, amended 21 U.S.C. § 841(b) in 1984 to make punishment dependent upon the quantity of the controlled dangerous substance involved.

39. H.R. Rep. No. 99-845, pt. 1, at 11-12, 17 (1986).

40. 21 U.S.C.A. § 841 (West Supp. 1991). The statute also sets graded penalties in 21 U.S.C.A. § 841 (b)(1)(A)(vi) and (viii). Congress employs the "mixture or substance containing a detectable amount" language when dealing with any amount dealt with by the statute for heroin, cocaine, LSD, and marijuana, but it only uses this language when dealing with one kilogram or more of PCP and methamphetamine. The implications of this will be addressed later in this note; see infra text accompanying note 53.

41. U.S. v. Larsen, 904 F.2d 562 (10th Cir. 1990); U.S. v. Elrod, 898 F.2d 981, 985-987 (8th Cir. 1990); U.S. v. Daly, 883 F.2d 313 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); U.S. v. Rose, 881 F.2d 386 (7th Cir. 1989); U.S. v. Taylor, 868 F.2d 125 (5th Cir. 1989). Every court of appeals to have addressed the issue has also held that this sentencing scheme is rational. See U.S. v. Mendes, 912 F.2d 434 (10th Cir. 1990); U.S. v. Murphy, 899 F.2d 714, 717 (8th Cir. 1990); U.S. v. Bishop, 894 F.2d 981, 986-87 (8th Cir. 1990); U.S. v. Holmes, 838 F.2d 1175, 1177-78 (11th Cir.), cert. denied, 486 U.S. 1058, 108 S. Ct. 2829 (1988); U.S. v. Klein, 860 F.2d 1489, 1501 (9th Cir. 1988); U.S. v. Hoyt, 879 F.2d 505, 512 (9th Cir. 1989); U.S. v. Savinovich, 845 F.2d 834, 839 (9th Cir.), cert. denied, 488 U.S. 943, 109 S. Ct. 369 (1988); U.S. v. Ramos, 861 F.2d 228, 231-32 (9th Cir. 1988).

42. Chapman v. U.S., 111 S. Ct. 1919, 1921 (1991).

43. U.S. v. Healy, 729 F. Supp. 140 (D.D.C. 1990).

B. *The Majority's Decision in Chapman*

Richard L. Chapman was convicted in the district court[44] and the Seventh Circuit Court of Appeals affirmed his conviction for selling ten sheets (1000 doses) of blotter paper containing LSD.[45] The Supreme Court granted a writ of certiorari to decide whether the weight of the carrier medium would be included with the weight of the pure drug for sentencing purposes under 21 U.S.C. section 841.[46]

Because a pure dose of LSD is so small, it must be sold to retail customers in a "carrier."[47] In *Chapman*, the petitioners used blotter paper as the carrier medium in order to distribute the LSD. The pure LSD was dissolved in a solvent such as alcohol and sprayed onto the paper, which could be cut into one-dose squares and then sold by dosage.[48] Users either swallow, lick, or drop the squares into a beverage in order to release the drug.[49]

Chapman's pure LSD weighed only 50 milligrams (.05 grams), but the court used the total weight of the blotter paper and the LSD, 5.7 grams, in order to determine his sentence. Thus, under the statutory scheme, Chapman was subject to the five-year minimum mandatory sentence. Chief Justice Rehnquist delivered the opinion of the Court in which six other justices joined.[50] In this opinion, the Court held that "the statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD, *and this construction is neither a violation of due process, nor unconstitutionally vague.*"[51] Justice Stevens filed a dissenting opinion in which Justice Marshall joined.

The majority reasoned that because the statute refers to a "mixture or substance containing a detectable amount," the statute requires that the entire mixture or substance be weighed when calculating the sentence.

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44. Chapman's conviction in U.S. District Court (W.D. Wis.) is unreported. At the appellate level, Chapman's trial was consolidated with Stanley J. Marshall, hence the name U.S. v. Marshall, 908 F.2d 1312 (7th Cir. 1990). Marshall's district court case is reported at U.S. v. Marshall, 706 F. Supp. 650 (C.D. Ill. 1989). Marshall did not appeal to the Supreme Court at the same time as Chapman. Therefore the Supreme Court case is Chapman v. U.S. Marshall's petition for writ of certiorari was denied at Marshall v. U.S., 111 S. Ct. 2796 (1991).

45. U.S. v. Marshall, 908 F.2d 1312 (7th Cir. 1990), aff'd sub nom. Chapman v. U.S., 111 S. Ct. 1919 (1991).

46. Chapman v. U.S., 111 S. Ct. 579 (1990).

47. Chapman v. U.S., 111 S. Ct. 1919, 1921 (1991).

48. Id. at 1923. The paper could also have been dipped in the solution. "The solvent evaporates, leaving minute amounts of LSD trapped in the paper." Id.

49. Id. at 1921.

50. Justices White, Blackmun, O'Connor, Scalia, Kennedy, and Souter joined Chief Justice Rehnquist in his opinion.

51. 111 S. Ct. at 1929.

The Court supported this reading by pointing to the fact that with respect to PCP and methamphetamine, Congress provided for a mandatory minimum sentence based *either* on the weight of the "mixture or substance containing a detectable amount" of the drug *or* on lower weights of PCP or methamphetamine. With respect to these two drugs Congress clearly distinguished between the pure drug and a mixture or substance containing a detectable amount of the pure drug. Thus, the Court noted that Congress knew how to insure that the weight of the pure drug only would be used to determine the sentence and could have done so with LSD if they so chose.[52]

Although with LSD the weight of the pure drug is so small that the carrier will constitute nearly all of the weight of the entire unit and thus, courts will be basing the sentence on the weight of the carrier rather than the drug, the Court refused to exclude the weight of the carrier. The Court noted:

> The same point can be made about drugs like heroin and cocaine, however, and Congress clearly intended the dilutant, cutting agent or carrier medium to be included in the weight of those drugs for sentencing purposes. Inactive ingredients are combined with pure heroin or cocaine and the mixture is then sold to consumers as a heavily diluted form of the drug.[53]

The Court further reasoned that the LSD and the blotter paper formed a mixture within the ordinary meaning of the word. A mixture is "a portion of matter consisting of two or more components . . . that however thoroughly commingled are regarded as retaining a separate existence."[54] When the solvent evaporates from the blotter paper the LSD crystals left behind commingle with the paper, but they do not chemically combine. Thus, like heroin or cocaine, diluted with cutting agents, the LSD retains a separate existence but cannot be distinguished nor easily separated from the blotter paper. It is also like the cutting agents used with other drugs because the blotter paper, gelatin, or sugar cube carrying the drug can be, and often is, ingested with the drug.[55]

Addressing Chapman's arguments that the statutory construction was unconstitutional, the Court stated that Congress had a rational basis for its choice of penalties for LSD distribution: "The penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level."[56] This penalty scheme

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52. Id. at 1924.

53. Id.

54. Id. at 1926. The Court cites Webster's Third New International Dictionary 1449 (1986) for its definition of mixture.

55. 111 S. Ct. at 1926.

56. Id. at 1927, citing H.R. Rep. No. 99-845, pt. 1, at 12, 17.

assigns more severe penalties to those who distribute larger quantities of drugs:

> By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess larger quantities of drugs, regardless of their purity.[57]

Although LSD is sold by dose and not by weight, as with cocaine, and the carrier medium is not used to dilute it, but rather to facilitate its distribution, blotter paper is a tool of the trade which makes LSD easier to transport, store, conceal, and sell. Therefore, the Court reasoned that Congress acted rationally in setting penalties based on this chosen tool.

The Court also noted that Congress was justified in seeking to avoid arguments about the accurate weight of pure drugs which would have to be extracted from the blotter paper in order to calculate the weight of the pure drug for sentencing purposes. Although hypothetical cases can be imagined involving very heavy carriers and very little LSD, those cases are of no importance in considering a claim by those who used a standard LSD carrier, as Chapman did. Thus, the Court concluded that since blotter paper seems to be the carrier of choice, the majority of the cases will do exactly what the sentencing scheme was intended to do and punish more heavily those who deal in larger amounts of drugs.[58]

The Court then dismissed Chapman's further constitutional claims in a concise manner. The Court stated that although those with varying degrees of culpability will be subjected to the same minimum sentence because of choosing different carriers, the statutory scheme is constitutional. The Court also noted that while there may be plausible arguments against describing the blotter paper impregnated with LSD as a "mixture or substance containing" LSD, the statute is not necessarily vague.[59] Thus, the Court upheld the decision of the court of appeals[60] against Chapman and the reasoning of all of the courts of appeals and district courts (except one[61]) which had held that the weight of the carrier medium must be included in determining the appropriate sentence.[62]

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57. 111 S. Ct. at 1927-28.
58. Id. at 1928.
59. Id. at 1928, 1929.
60. U.S. v. Marshall, 908 F.2d 1312 (7th Cir. 1990).
61. U.S. v. Healy, 729 F. Supp. 140 (D.D.C. 1990).
62. Chapman v. U.S., 111 S. Ct. 1919, 1929 (1991).

C. Analysis

Based on the "detectable amount language" present in 21 U.S.C. section 841, the legislative history of this statute,[63] and the fact that Congress knew how to insure that only the pure drug would be weighed for sentencing purposes,[64] it is difficult to find fault with the Court's interpretation of both the statute and Congress' intent. However, the statutory scheme as interpreted by the majority fails to embody the congressional goal of *structuring sentences to fit the crimes committed.* The purposes for the Sentencing Guidelines are clearly documented in its statement of Statutory Mission, which states that the Guidelines "further the basic purposes of criminal punishment: deterrence, incapacitation, *just punishment*, and rehabilitation. The [Sentencing Reform] Act delegates broad authority to the commission to *review and rationalize* the federal sentencing process."[65] In addition, the Policy Statement of the Guidelines notes that:

> Congress sought *reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.* [Congress also] sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.[66]

Because the Court chose to interpret the statute literally—refusing to hold the statute ambiguous so as to reinterpret it, or unconstitutional so as to strike it down—and because *Chapman* was a 7-2 decision and Justice Marshall, one of the dissenters, has retired, it is highly unlikely that the Court will correct this problem by reversing its decision. Thus, the problems created by this statutory scheme must be addressed by Congress in order to be corrected.

The problem with the penalty scheme as set forth in 21 U.S.C. section 841 and the parallel federal sentencing guidelines,[67] which both include the "detectable amount" language, is that punishment is no longer related to criminal culpability.[68] The grading of penalties for drug trafficking is a result of Congress' intent to punish drug traffickers severely, and in particular, to punish those who sell large quantities of

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63. See supra text accompanying notes 37-40.

64. See supra text accompanying note 52.

65. U.S. v. Rolande-Gabriel, 938 F.2d 1231, 1235 (11th Cir. 1991) (quoting U.S.S.G., ch. 1, pt. A, at 1.1-.10 (1990) (emphasis added by court).

66. 938 F.2d at 1235 (quoting U.S.S.G., ch. 1, pt. A, at 1.2).

67. U.S.S.G. § 2D1.1.

68. The majority in *Chapman* admits this fact: "Such a sentencing scheme—not considering individual degrees of culpability—would clearly be constitutional." Chapman v. U.S., 111 S. Ct. 1919, 1928 (1991).

drugs more severely than those who sell small quantities.[69] Thus, one may infer that Congress believes that the amount of drugs a defendant possesses directly relates to his criminal culpability. This is based on the idea that one who possesses an unusually large amount of a drug cannot possibly ingest the entire amount and must therefore plan to distribute some of the drug. But, as noted earlier, the statutory scheme fails to embody these congressional goals.

While it seems only logical for a sentence to be based on the amount of the pure drug possessed, with cocaine and heroin the "market-oriented" approach to punishing drug trafficking adopted by Congress in the 1986 Anti-Drug Act may be reconciled with criminal intent. This is because in addition to being consumed on the basis of weight, these drugs are also sold by weight (often in a diluted form). Congress' adoption of the "mixture or substance method of grading punishment reflected a conscious decision to mete out heavy punishment to large retail dealers, who are likely to possess 'substantial street quantities' of the diluted drug ready for sale."[70] Therefore, the drug dealers are punished for the amount of the usable consumable substance which they deliver. "Based as it is on weight, the system . . . works well for drugs that are sold by weight; and ordinarily the weight quoted to the buyer is the weight of the dilute form, although of course, price will vary with purity. The dilute form is the product. . . ."[71]

While the statute fixes the minimum and maximum punishments, the actual punishment in a particular case may be found in the Sentencing Guidelines, which "proportion punishment to the weight of the mixture or substance defined as in the statute"[72] and "permit an adjustment upward for sales of unusual purity."[73]

Even though the scheme may sometimes result in a less severe sentence for possessing a purer form of the illegal drug than a less potent form of the same drug, with drugs sold by weight the entire scheme at least attempts to tie the severity of the punishment to the usable amount possessed, thus, somewhat reconciling this method of sentencing with criminal culpability. However, LSD is sold by the dose. It is neither cut nor diluted. Price is based on the number of doses sold, and "neither the price nor the number of purchasers of the doses will increase because the LSD is sold on blotter paper instead of in its granular or liquid form."[74]

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69. See supra text accompanying notes 56-57.
70. H.R. Rep. No. 845, 99th Cong. 2d Sess. 11-12 (1986).
71. U.S. v. Marshall, 908 F.2d 1312, 1331 (7th Cir. 1991) (Posner, J., dissenting).
72. U.S.S.G. § 2D1.1, comment (n.1).
73. Id. at n.9.
74. *Marshall*, 908 F.2d at 1330 (Posner, J., dissenting).

Whether one dose is sold in a sugar cube, on blotter paper, in a pitcher of orange juice or on a brick, it is still only one dose. "[A] quart of orange juice containing one dose of LSD is not more in any relevant sense, than a pint of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint."[75] Thus, the carrier medium for the LSD is not designed to dilute it because, unlike cocaine, the same amount of the pure drug is always sold as one dose.

In addition, the weight of the drug is so slight relative to the weight of the carrier that Congress may have well said: If there is a carrier, weigh it and forget the LSD.[76] Indeed, the Court acknowledged "under the Sentencing Guidelines those selling the same number of doses would be subject to widely varying sentences depending upon which carrier medium was chosen."[77]

The problem with basing the sentence on the weight of the carrier rather than the drug is its lack of relation to criminal culpability. This was illustrated by Judge Posner:

> A person who sells LSD on blotter paper is not a worse criminal than one who sells the same number of doses on gelatin cubes, but he is subject to a heavier punishment. A person who sells five doses of LSD on sugar cubes is not a worse person than a manufacturer of LSD who is caught with 19,999 doses in pure form, but the former is subject to a ten-year mandatory minimum no-parole sentence while the latter is not even subject to the five-year minimum. . . . The defendant in United States v. Rose . . . must have bought an unusually heavy blotter paper, for he sold only 472 doses, yet his blotter paper weighed 7.3 grams—more than Chapman's, although Chapman sold twice as many doses.[78]

Thus, instead of punishing more severely those who sell large quantities of LSD, the majority's decision would punish more severely those

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75. Id. at 1332.

76. Chapman v. US, 111 S. Ct. 1919, 1933 (1991) (Stevens, J., dissenting).

77. Id. at 1925. Citing the petioner's brief in footnote 2, the majority acknowledges the following disparities in sentencing:

CARRIER	WEIGHT OF 100 DOSES	BASE OFFENSE LEVEL	GUIDELINES RANGE (MONTHS)
Sugar Cube	227 gr.	36	188-235
Blotter Paper	1.4 gr.	26	63-78
Gelatin Capsule	225 mg.	18	27-33
Pure[ ] LSD	5 mg.	12	10-16

78. *Marshall*, 908 F.2d at 1333. Cited by the dissent in *Chapman*, 111 S. Ct. at 1932.

who sell small quantities in weighty carriers,[79] which has no relation at all to criminal culpability.

The majority realized that those with different degrees of culpability will be subject to the same minimum sentences because of choosing different carriers, but noted that "distributors of LSD make their own choice of carriers and could act to minimize their potential sentences. As it is, almost all distributors choose blotter paper, rather than the heavier and bulkier sugar cubes."[80]

Since the blotter paper, gelatin, or sugar cubes in which the LSD is dissolved is an integral part of the consumable substance, it is understandable that the Court would compare it to the cutting agents and weigh it along with the LSD for sentencing purposes.[81] However, when the weight of the carrier medium determines a person's sentence, there is a definite problem with the statutory scheme. In *Chapman* the Court states that Congress is justified in not wanting to extract the pure drug from the blotter paper in order to determine its weight because of the difficulty in doing so.[82] But as Judge Posner stated, "the weight is reported in every case I have seen, so apparently it can be determined readily enough[;] it *has* to be determined in any event to permit a purity adjustment under the Guidelines."[83] He further suggests that the difficulty of determining the weight of the LSD is easily overcome by basing punishment on the number of doses, which makes more sense in any event.[84]

Although the Court did not accept Judge Posner's arguments of flexible interpretation in order to exclude the weight of the carrier medium under the statutory scheme, Congress should pay attention to his reasoning.[85] Changing the statutory scheme for LSD by basing it on the weight of the pure drug sold or on the number of doses sold is

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79. *Chapman*, 111 S. Ct. at 1934.

80. Id. at 1928 n.6.

81. See supra text accompanying note 55.

82. See supra text accompanying note 58.

83. U.S. v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner, J., dissenting).

84. "*To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant.*" Id. at 1333 (emphasis added).

85. Id. at 1335. It is interesting that Judge Posner wrote the opinion in U.S. v. Rose, 881 F.2d 386 (7th Cir. 1989), which held that the blotter paper was to be included for sentencing purposes. In *Marshall*, he states:

> I wrote *Rose*, but I am no longer confident that its literal interpretation of the statute, under which the blotter paper, cubes, etc. are "substances" that "contain" LSD is inevitable. The blotter paper, etc. are better viewed, I now think, as carriers, like the package in which a kilo of cocaine comes wrapped or the bottle in which a fifth of liquor is sold.

the only way to relate the drug dealer's sentence to the gravity of his misconduct.[86]

D. *Transport Carrier Mediums*

One of the problems of the Supreme Court's holding in *Chapman* is the Court's failure to distinguish carrier mediums and *transport* carrier mediums. The Court merely stated that the LSD blotter paper was a mixture like the cocaine and cutting agents because, like the cocaine, the LSD cannot be distinguished from it, and like the cutting agents, the blotter paper can be and often is ingested with the drug. The Court further stated that the term "mixture" does not include LSD in a bottle or in a car, because the drug can be easily distinguished from and separated from such a "container" since the drug never mixes with a glass vial or automobile, nor bonds chemically with the vial or car. The Court acknowledged that weights of containers and packaging materials generally are not included in determining a sentence for distribution, but once again, based their exclusion on the fact that those items are not mixed with or otherwise combined with the drug.[87] This leads to the problem in the cocaine-suitcase scenario described in the introduction to this note. In that case, the cocaine and the acrylic were chemically bonded and the suitcase was used as a transport carrier medium. The problem is whether to include the weight of this type of transport carrier medium, which has some of the characteristics of both the carrier

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86. The following amendments have been proposed, as the dissent states in *Chapman* at 1931:

> Senator Biden offered a technical amendment, the purpose of which was to correct an inequity that had become apparent from several recent court decisions. According to Senator Biden, "[t]he amendment remedies this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or substance." 135 Cong. Rec. S12748 (Oct. 5, 1989). Although Senator Biden's amendment was adopted as part of Amendment No. 976 to S. 1711, the bill never passed the House of Representatives. Senator Kennedy also tried to clarify the language of 21 U.S.C. 841. He proposed the following amendment:
> CLARIFICATION OF MIXTURE OR SUBSTANCE.
> Section 841(b)(1) of title 21, United States Code, is amended by inserting the following new subsection at the end thereof:
>
> > (E) In determining the weight of a "mixture or substance" under this section, the court shall not include the weight of the carrier upon which the controlled substance is placed, or by which it is transported.
>
> 136 Cong. Rec. S7069-70 (May 24, 1990, Part II).

Although such subsequent legislation must be approached with circumspection because it can neither clarify what the enacting Congress had contemplated nor speak to whether the clarifications will ever be passed, the amendments, at the very least, indicate that the language of the statute is far from clear or plain.

87. Chapman v. U.S., 111 S. Ct. 1919, 1933 (1991) (emphasis added) (Stevens, J., dissenting).

mediums and the containers as described in *Chapman*, with the pure drug for sentencing purposes. This issue has caused a split in the United States courts of appeals.

In *United States v. Rolande-Gabriel*,[88] the Eleventh Circuit held that the "term 'mixture'. . . does not include usable mixtures."[89] Customs officials at the Miami airport found sixteen bags containing a liquid substance and cocaine within the clothing of Rolande-Gabriel. The gross weight of the contents of the bags was 241.6 grams, while the extracted powder weighed 72.2 grams (7.2 grams were cocaine base and 65 grams were a cutting agent). The court accepted Rolande-Gabriel's argument that the liquid was merely a carrier medium unrelated to the cocaine's use, and that the drug was in an unusable form until the powder was extracted from the liquid.[90] The court distinguished this liquid from Chapman's blotter paper:

> In *Chapman*, the LSD and other drugs considered by the Court were usable, consumable, and ready for distribution when placed on standard carrier mediums, such as blotter paper, gel and sugar cubes . . . . Like cutting agents used with other drugs that are ingested, the blotter paper, gel or sugar cube carrying LSD can be and often is ingested with the drug.[91]

The court noted that the present case presents one of the so-called hypothetical cases spoken of in *Chapman* involving very heavy carriers but very little drug and that even the Supreme Court recognized that different situations may lead to different interpretations.[92]

One could hardly argue with the result in *Rolande-Gabriel*, but does it truly comport with the decision of the Supreme Court in *Chapman*? At least two courts of appeals have held that the weight of the carrier medium is to be included whether usable or unusable.[93] In *United States v. Mahecha-Onofre*,[94] the cocaine suitcase case, the court used the weight of the acrylic matter forming the suitcase and the cocaine to determine the appropriate sentence.[95] Citing *Mahecha* and *Chapman*, the United States First Circuit Court of Appeals in *United States v. Restrepo-*

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88. 938 F.2d 1231 (11th Cir. 1991).

89. Id. at 1238.

90. Id. at 1233.

91. Id. at 1237.

92. Chapman v. U.S., 111 S. Ct. 1919, 1928 (1991) states that while "hypothetical cases can be imagined involving heavy carrier and very little [drug], those cases are of no import in considering a claim by persons such as petitioners, who used a standard [drug] carrier."

93. U.S. v. Mahecha-Onofre, 936 F.2d 623 (1st Cir. 1991); U.S. v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991).

94. 936 F.2d 623 (1st Cir. 1991).

95. See supra text accompanying note 1.

Contreras[96] held that the total weight of eleven beeswax statues containing cocaine was to be used to determine Restrepo-Contreras' sentence. The entire weight of the statues was twenty-six kilograms while the cocaine weighed five kilograms.

In order for the defendant's punishment to relate to his or her culpability, the courts must exclude the weight of the transport carrier mediums as the Eleventh Circuit did in *Rolande-Gabriel*. By holding that the term "mixture" did not include unusable mixtures, the court avoided absurd results and anomalous sentences.

IV. CONCLUSION

Since the amendment of Louisiana Revised Statutes 40:967, both Louisiana's statute and the federal statute[97] contain the same "detectable amount" language. Based on the purposes stated in committee for the inclusion of the "detectable amount" language and the overwhelming number of federal cases, most notably *Chapman v. United States*, interpreting this language, Louisiana will probably find that the weight of the entire mixture or substance and not just the pure drug should be used for sentencing purposes. Fortunately, Louisiana's statute only uses this detectable amount language in connection with sentences for possession of cocaine, amphetamines, and methaphetamines, while the federal statute uses the "detectable amount" language for cocaine, LSD, heroin, PCP, and methamphetamines. Thus, Louisiana's statutory scheme only includes the weight of the dilutants such as talcum powder used to cut cocaine and not the blotter paper, sugar cubes, or gelatin used to carry the LSD. This eliminates the problem addressed in *Chapman* in which the convicted's punishment is truly based on the weight of the carrier rather than the pure drug due to the insignificant weight of pure LSD. Whether the Louisiana courts will include the weight of the transport carrier mediums such as the cocaine suitcase remains to be seen. Hopefully, the courts will distinguish these transport carrier mediums as did the Eleventh Circuit in *United States v. Rolande-Gabriel*,[98] thus, excluding the weight of unusable substances for sentencing purposes. Such an exclusion would lead to more rational sentences because a person's culpabilty would be linked directly to his punishment.

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96. 942 F.2d 96 (1st Cir. 1991).
97. 21 U.S.C.A. § 841 (West Supp. 1991).
98. 938 F.2d 1231 (11th Cir. 1991).